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No. 82-11

IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

MENNONITE BOARD OF MISSIONS ..... Appellant

v.

RICHARD C. ADAMS ..... Appellee

APPEAL FROM THE INDIANA COURT OF APPEALS

JOINT APPENDIX

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APPEAL DOCKETED JULY 1, 1982
PROBABLE JURISDICTION NOTED OCTOBER 12, 1982

JOINT APPENDIX

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NOTATION CONCERNING PREVIOUSLY PRINTED PARTS OF THE RECORD

The following parts of the record of this case have been omitted in the printing of this Appendix because they appear in the Appendix (App.) attached to the Jurisdictional Statement (Jur. St.) filed with the Court on July 1, 1982:

Opinion of the Indiana Court of Appeals dated October 29, 1981....Jur. St. App. p. 17

Opinion of the Indiana Court of Appeals in the case of First Savings and Loan Association of Central Indiana v. Furnish dated September 19, 1977....Jur. St. App. p. 29

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 1, 1979--Complaint to quiet title filed.

Nov. 2, 1979--Sheriff of Elkhart County, Indiana, returns Summons served [on both Defendants].

Dec. 5, 1979--Answer and Affirmative Defense by the defendant, Mennonite Board of Missions.

Dec. 5, 1979--Plaintiff files motion for default judgment against the defendant Moore.

Dec. 5, 1979--The trial court grants default judgment against the defendant Alfred Jean M. Moore only.

Dec. 5, 1979--Plaintiff also files motion for summary judgment as to the defendant, Mennonite Board of Missions.

Jan. 2, 1980--Defendant, Mennonite Board of Missions, files affidavit in

opposition to motion for summary judgment.

Jan. 31, 1980--Defendant, Mennonite Board of Missions, files Motion for Summary Judgment.

Jan. 31, 1980--Hearing on Cross Motions for Summary Judgment. The trial court hears arguments and takes this cause under advisement.

Feb. 2, 1980--Defendant, Mennonite Board of Missions, tenders funds to the Court in the amount of $2,062.54.

Feb. 26, 1980--The trial court enters summary judgment for the plaintiff and against the defendant, Mennonite Board of Missions.

Apr. 21, 1980--Defendant, Mennonite Board of Missions, files motion and memorandum to correct errors.

May 1, 1980--Trial court denies the motion to correct errors.

STATE OF INDIANA)
COUNTY OF ELKHART) SS:

IN THE ELKHART SUPERIOR COURT
1980 TERM
CAUSE NO: 50004

RICHARD C. ADAMS,
Plaintiff
v
ALFRED JEAN M. MOORE and MENNONITE BOARD OF MISSIONS,
Defendants

PLAINTIFF'S ACTION TO QUIET TITLE

Filed Nov. 1, 1979

COMES NOW the Plaintiff, Richard C. Adams, and for his Action to Acquire Title for Real Estate says as follows:

1. That the Plaintiff owns in fee simple and is entitled to possess real estate situate in the City of Elkhart, County of Elkhart, State of Indiana, and described as follows:

> Lot numbered 240 as the said Lot is known and designated on the recorded plat of Morehouse Second Addition to the City of Elkhart.

2. That pursuant to sale by public auction on August 8, 1977, the Plaintiff received a proper "Certificate of Sale" in

return for the purchase price he bid and paid on said real estate, said public auction being conducted by a governmental entity known as Elkhart County because of the failure of persons interested in the aforedescribed real estate to pay accruing real estate taxes thereon.

3. That on August 10, 1979, the Plaintiff presented the aforementioned "Certificate of Sale" to the Auditor of Elkhart County, Indiana, as by law provided and on said date the Auditor of Elkhart County executed and conveyed to the Plaintiff a proper tax deed as to the aforedescribed real estate.

4. That on August 14, 1979, said deed was recorded in Tax Deed Record 007, page 911, in the office of the Recorder of Elkhart County, State of Indiana; a copy of said deed is attached hereto as Exhibit A and made a part hereof.

5. That said Defendants, and each of them, claim or make claims from estate, right, title, lien or interest in or to said property adversed (sic) to the Plaintiff, including the claim of fee simple ownership to said property of Alfred Jean M. Moore and the claim of a real estate mortgage interest in favor of Mennonite Board of Missions arising out of a Real Estate Mortgage recorded in Volume 388, Page 693, Records, Elkhart County, Indiana, which mortgage originally called for the payment of Fourteen Thousand Dollars ($14,000.00) by Alfred Jean M. Moore to the Defendant Mennonite Board of Missions.

6. That pursuant to Indiana law, and the procedures established thereby for the sale of real property by local county governments for nonpayment of taxes, the tax deed aforementioned of the Plaintiff is superior to, and has priority over, any

estate, right, title, lien or interest in or to the aforedescribed real estate of the Defendant Alfred Jean M. Moore and the Defendant Mennonite Board of Missions.

7. That pursuant to Indiana Code Section 6-1.1-25-4 the tax deed of the Plaintiff granted to the Plaintiff in a (sic) state in fee simple absolute in the aforedescribed real estate, free and clear of all liens and encumbrances except the lien of the State of Indiana for taxes and special assessments with which have accrued subsequent to date of the original tax sale as to said real estate.

8. That this action is instituted pursuant to Indiana Code Section 6-1.1-25-14 et. seq. providing a specific cause of action to quiet title to real estate acquired by tax deed.

WHEREFORE, the Plaintiff prays:

1. That the Defendants and all persons claiming under them be required to

set forth the right and nature of their claims, if any, to said real estate.

2. That all adverse claims of the Defendants and all of the titled persons claiming under them in and to said real estate aforedescribed be determined by Decree of this Court.

3. That this Court adjudge and declare that the Plaintiff owns in fee simple absolute, and is entitled to the lawful, peaceful, and continuous possession of, the aforedescribed real estate, and that the Defendants, and all persons claiming under them, have no estate, right, title, lien or interest whatever in or to said real property, or any part thereof.

4. That this Court permanently enjoin the Defendants and all persons claiming under them from asserting any adverse claim to Plaintiff's title to said real estate.

5. That this Court declare that the real estate described herein is free and clear of any lien or encumbrance except the lien, if any, of the State of Indiana for taxes and special assessments which have accrued subsequent to the date of the original tax sale as to said real estate.

6. That the Plaintiff be granted such other and further relief as the Court may deem just and proper.

(s) Robert W. Miller

* * * * *

[IN THE ELKHART SUPERIOR COURT]

SUMMONS

Filed November 1, 1979
[Caption Omitted in Printing]

The State of Indiana to the Defendant

Mennonite Board of Missions

Address:

--any executive officer thereof
500 South Main Street
Elkhart, IN 46514

You have been sued by the person(s) named "plaintiff", in the court stated above.

The nature of the suit against you is stated in the complaint which is attached to this document. It also states the demand which the plaintiff has made and wants from you.

You must answer the complaint in writing, by you or your attorney, within twenty (20) days (23 days if service by certified mail) commencing the day after you receive this summons, or judgment will

be entered against you for what the plaintiff has demanded.

If you have a claim for relief against the plaintiff arising from the same transaction or occurrence, you must assert it in your written answer.

PRAECIPE

The following manner of service of summons is hereby designated: By personal service of the Sheriff of Elkhart County, Indiana.

Date November 1, 1979.

(s) Robert W. Miller
Attorney for Plaintiff

* * * * *

* * * * *

RETURN OF SUMMONS

This summons came to hand this 1st day of November, 1979, and I served the same, on the 1st day of November, 1979.

(1) by reading the same to and in the hearing of and by delivering copies of the

summons and complaint to Mennonite Board of Missions (LeRoy Yoder, Treas.)

* * * * *

And I now return this writ this 2nd day of November, 1979.

(s) Dick W. Bowman
Sheriff of Elkhart County, Indiana

By C-29 H. Helser
Deputy

* * * * *

[IN THE ELKHART SUPERIOR COURT]

ANSWER AND AFFIRMATIVE DEFENSE OF THE DEFENDANT, MENNONITE BOARD OF MISSIONS

Filed Dec. 5, 1979
[Caption Omitted in Printing]

Comes now the Defendant, Mennonite Board of Missions, by Counsel and for the answer to the Complaint files (sic) in this cause, says the following:

1. That the Defendant, Mennonite Board of Missions, denies rhetorical paragraphs 1, 6 and 7 of the Complaint.

2. That the Defendant, Mennonite Board of Missions, lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in rhetorical paragraphs 2 and 3 of the Complaint and accordingly, denies them.

3. That the Defendant, Mennonite Board of Missions, has received Exhibit A attached to the Complaint, but has no knowledge as to the authenticity of Exhibit A or the legal import of Exhibit A, and accordingly, denies the allegations contained in rhetorical paragraph 4 of the Complaint.

4. That the defendant, Mennonite Board of Missions, admits that it is the mortgagee of a certain mortgage between the Mennonite Board of Missions and one Alfred Jean M. Moore, which said mortgage is duly recorded of record in the Mortgage Records, Volume 388, Page 693, in the Records of the Elkhart County Recorder's

Office, but the Defendant, Mennonite Board of Missions, denies the remaining portions of rhetorical paragraph 5.

5. That the Defendant, Mennonite Board of Missions, admits that Ind. Code §6-1.1-25-14 reads as follows, to-wit: (H.I.)

WHEREFORE, the Defendant, Mennonite Board of Missions, prays that the Court deny the relief sought by the Plaintiff, and enter judgment in favor of the Defendant, Mennonite Board of Missions, to the effect that any and all claims of the Plaintiff be declared to be inferior to, subject to, and secondary to the interests of the Defendant, Mennonite Board of Missions, relative to the prior recorded interest of the Defendant, Mennonite Board of Missions, concerning certain real estate situated in the County of Elkhart, which is the subject matter of this present litigation, and that the costs (sic)

be assessed against the Plaintiff, and for all other relief proper in the premises.

II.

AFFIRMATIVE DEFENSES

Comes now the Defendant, Mennonite Board of Missions, by counsel and for affirmative defenses alleges and says the following:

1. That to the extent that Ind. Code §6-1.1-25-4 which reads as follows, to-wit: (H.I.) can be construed to give the Plaintiff a fee simple absolute to the property which is the subject matter of this litigation, free and clear of the interest of Defendant, Mennonite Board of Missions, that statute is unconstitutional as applied to the Defendant, Mennonite Board of Missions, and further, violates the fundamental notions of due process as set out in the United States Constitution

and/or the Indiana Constitution as provided in U.S. Const., Amend XIV, and Ind. Const. Art. 1, Section 12. Accordingly, any interest of the Plaintiff to the subject real estate is inferior to, subject to, or secondary to the interest of the Defendant, Mennonite Board of Missions.

2. That to the extent the applicable provisions of the Indiana law can be construed to give the Plaintiff a fee simple absolute to the property which is the subject matter of this litigation, free and clear of the interest of the Defendant, Mennonite Board of Missions, that statute is unconstitutional as applied to the Defendant, Mennonite Board of Missions, and further, violates the fundamental notions of due process as set out in the United States Constitution and/or the Indiana Constitution as provided in U.S. Const., Amend. XIV, and Ind. Const.,

Art. 1, Section 12. Accordingly, any interest of the Plaintiff to the subject real estate is inferior to, subject to, or secondary to the interest of the Defendant, Mennonite Board of Missions.

3. That the applicable provisions of Indiana law have not been followed, which would otherwise give the Plaintiff a fee simple absolute, and thus, the Plaintiff's interest, if any, to the property which is the subject matter of this present litigation is inferior to, secondary to, and subject to the recorded interest of the Defendant, Mennonite Board of Missions.

WHEREFORE, the Defendant, Mennonite Board of Missions, prays that the Court deny the relief sought by the Plaintiff, and enter judgment in favor of the Defendant, Mennonite Board of Missions, to the effect that any and all claims of the Plaintiff be declared to be inferior to, subject to, and secondary to the interests

of the Defendant, Mennonite Board of Missions, relative to the prior recorded interest of the Defendant, Mennonite Board of Missions, concerning certain real estate situated in the County of Elkhart, which is the subject matter of this present litigation, and that the costs (sic) be assessed against the Plaintiff, and for all other relief proper in the premises.

* * * * *

(s) C. Whitney Slabaugh

(s) William J. Cohen

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

MOTION FOR DEFAULT JUDGMENT

Filed Dec. 5, 1979
[Caption Omitted in Printing]

COMES NOW the Plaintiff, by counsel, and moves the Court to enter a default judgment against the Defendant, Alfred Jean M. Moore, and in support thereof would show to the Court that summons and complaint was issued and served upon said Defendant on the first day of November, 1979, and that no responsive pleading or other action or appearance has been accomplished by said Defendant.

In support thereof the Plaintiff would rely on the attached Affidavit of the Plaintiff.

(s) Robert W. Miller

* * * * *

[IN THE ELKHART SUPERIOR COURT]

AFFIDAVIT OF ADAMS

Filed Dec. 5, 1979
[Caption Omitted in Printing]

COMES NOW Richard C. Adams, Plaintiff in the above captioned cause, duly sworn under oath deposes and says:

1. That he is Plaintiff in the above captioned cause and he has read over the attached Action to Quiet Title To Real Estate which he caused to be filed through counsel in the Elkhart Superior Court, on November 1, 1979.

2. That the facts set forth in the attached Action filed are true and correct to the best of the knowledge and information and belief of your affidavit.

3. That your affiant has personally reviewed the records of the Elkhart County Recorder and the statutes set forth in said action and the same are as set forth in said complaint filed by your affidavit.

I affirm, under the pains of perjury that the foregoing representations are true.

(s) Richard C. Adams

[Copy of Complaint Attached to Affidavit Omitted in Printing]

STATE OF INDIANA)
COUNTY OF ELKHART) SS:

IN THE ELKHART SUPERIOR COURT
1980 TERM
CAUSE NO: 50004

RICHARD C. ADAMS,
Plaintiff
v
ALFRED JEAN M. MOORE and MENNONITE BOARD OF MISSIONS,
Defendants

DEFAULT DECREE

Filed Dec. 5, 1979

The Plaintiff, Richard C. Adams, having, by counsel, filed a Motion For Default Judgment against the Defendant, Alfred Jean M. Moore, and having filed a supporting Affidavit and an Affidavit of Non-Military Status and the Defendant, Alfred Jean M. Moore, having failed to

appear or otherwise comply with the Indiana Rules for Civil Procedure and having been served summons and complaint is now called and defaulted.

The Court being advised now enters judgment in favor of the Plaintiff, Richard C. Adams, and now enters judgment against the Defendant, Alfred Jean M. Moore, and now finds that Richard C. Adams, Plaintiff herein, is the owner of the following described real estate situated in Elkhart County, State of Indiana, free and clear of any claim of the Defendant, Alfred Jean M. Moore, said real estate being described as follows:

to-wit -

> Lot numbered 240 as the said Lot is known and designated on the recorded plat of Morehouse Second Addition to the City of Elkhart.

The Court now finds that the Plaintiff, Richard C. Adams, is the owner of the above described real estate in fee,

simple, absolute and the Court now does pursuant to Trial Rule 70(A) divest the Defendant, Alfred Jean M. Moore, of any interest she may have in the above described property and now vests title to said real estate in the Plaintiff, Richard C. Adams.

Judgment.

(s) Donald W. Jones
Donald W. Jones, Judge
Elkhart Superior Court

Dated this 5 day of December, 1979.

[IN THE ELKHART SUPERIOR COURT]

MOTION FOR SUMMARY JUDGMENT BY ADAMS

Filed Dec. 5, 1979
[Caption Omitted in Printing]

The Plaintiff, Richard C. Adams, pursuant to Trial Rule 56 of the Indiana Rules of Procedure, respectfully move (sic) the Court to enter a summary judgment in favor of the Plaintiff and against

the Defendant, Mennonite Board of Missions, on the grounds that there is no genuine issue as to any material facts herein and the Plaintiff is entitled to judgment as a matter of law.

This motion is based upon the complaint filed in this cause and the Affidavit of the Plaintiff, Richard C. Adams, filed in support of the Plaintiff's Motion for Default Judgment.

(s) Robert W. Miller

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

AFFIDAVIT OF DAVID C. LEATHERMAN

Filed Jan. 2, 1980
[Caption Omitted in Printing]

Comes now David C. Leatherman, and says the following:

1. That I am the Treasurer of the Defendant, Mennonite Board of Missions, a non-profit corporation;

2. That I have personally reviewed the books and records of the said corporation relative to a certain mortgage executed in favor of the Mennonite Board of Missions by Alfred Jean M. Moore, the mortgagor, and I find that the remaining balance due and owing from Alfred Jean M. Moore to the Mennonite Board of Missions is in the amount of Eight Thousand Two Hundred Thirty-Seven and 19/100 ($8,237.19) dollars, with interest at seven (7%) percent.

3. That the Defendant, Mennonite Board of Missions, had no knowledge whatsoever of a tax sale of the property which was the subject of a mortgage between The Mennonite Board of Missions and [Alfred] Jean M. Moore to the Plaintiff, Richard C. Adams.

4. That the Mennonite Board of Missions had no knowledge whatsoever that a tax deed for the property, which is the subject matter of this litigation, had been given to Richard C. Adams.

5. That the Mennonite Board of Missions has had no contact whatsoever from Richard C. Adams in regard to (sic) property, which is the subject matter of this litigation relative to a tax sale of any kind.

6. That the first knowledge that the Mennonite Board of Missions had that the property had been sold for taxes was on August 16, 1979, when Alfred Jean M. Moore

informed the Mennonite Board of Missions that she was in trouble.

7. That under the terms of the mortgage agreement between the Mennonite Board of Missions and Alfred Jean M. Moore, the mortgagor, Alfred Jean M. Moore, was responsible for paying the property taxes on the real estate, which is the subject matter of this present litigation.

8. That the Mennonite Board of Missions had no knowledge whatsoever that the property taxes on the property, which is the subject matter of this present litigation, had not been paid by Alfred Jean M. Moore until August 16, 1979.

9. That the Mennonite Board of Missions did pay the property taxes on the property, which is the subject matter of this present litigation, in June of 1974 and in November of 1974, but Alfred Jean M. Moore was to pay all subsequent property taxes due and owing.

I affirm, under the pains and penalties of perjury, that the foregoing representations are true.

(s) David C. Leatherman

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

MOTION FOR SUMMARY JUDGMENT OF THE DEFENDANT, MENNONITE BOARD OF MISSIONS

Filed Jan. 31, 1980
[Caption Omitted in Printing]

Comes now the Defendant, Mennonite Board of Missions, by counsel and respectfully moves the Court to enter Summary Judgment in its favor, for the relief requested in the Defendant's Answer and Affirmative Defense heretofore filed in this cause, and in support thereof, shows the Court the following:

1. That the pleadings, together with the affidavits on file in this case show

that there is no genuine issue as to any material fact, and that the Defendant, Mennonite Board of Missions, is entitled to a judgment as a matter of law.

WHEREFORE, the Defendant, Mennonite Board of Missions, prays that the Court deny the relief sought by the Plaintiff, and enter judgment in favor of the Defendant, Mennonite Board of Missions, to the effect that any and all claims of the Plaintiff are inferior to, subject to, and secondary to the interests of the Defendant, Mennonite Board of Missions, relative to the prior recorded interests of the Defendant, Mennonite Board of Missions, concerning certain real property situated in the County of Elkhart, which is the subject matter of this present litigation, and for all other relief proper in the premises.

* * * * *

(s) C. Whitney Slabaugh

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

MEMORANDUM OF THE DEFENDANT MENNONITE BOARD OF MISSIONS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Filed Jan. 31, 1980
[Caption Omitted in Printing]

RELEVANT FACTS

The facts in this case are not in dispute. On November 1, 1979, Richard C. Adams, herinafter referred to as Adams, filed an Action To Quiet Title To Real Estate against Alfred Jean M. Moore and Mennonite Board of Missions. Adams claims that he has fee simple to certain real estate situated in the City of Elkhart, State of Indiana, which said property is legally described as follows:

> Lot Numbered Two Hundred Forty (240) as the said lot is known and designated on the recorded plat of

Morehouse Second Addition to the City of Elkhart.

The basis for Adam's claim is that he received a tax deed on August 14, 1979, which said deed was duly recorded in Tax Deed Record 007, Page 911, in the Office of the Recorder of Elkhart County, and that Adams has pursuant to Indiana Code 6-1.1-25-4 (d), a statutory fee simple absolute to the above described property.

Apparently, Adams purchased the above described property at a tax sale on August 7, 1977, and the following day received a certificate of purchase of that property. Subsequently, on August 10, 1979, Adams presented the certificate of sale to the above mentioned property to the Auditor of Elkhart County and received a tax deed to the said property, and that on August 14, 1979, Adams recorded his tax deed.

Meanwhile, the Defendant, Mennonite Board of Missions, was unaware of any of

these activities by Adams relative to the said property. Quite the contrary, the Defendant, Mennonite Board of Missions, had no knowledge whatsoever of the tax sale of the said property; or that a tax deed had been given to Adams until after Adams had received it. In fact, the Mennonite Board of Missions has had no contact whatsoever from Richard C. Adams in regard to the said property until after August 16, 1979. The first knowledge that the Mennonite Board of Missions had that the said property had been sold for taxes was on August 16, 1979, when the Defendant, Alfred Jean M. Moore, informed the Mennonite Board of Missions that she was in trouble.

Prior to Adam's involvement, the Defendant, Alfred Jean M. Moore executed a mortgage in favor of the Defendant, Mennonite Board of Missions, on the said property, on February 7, 1973, which said

mortgage was duly recorded in the Elkhart County Recorder's Office on March 1, 1973, and is found at Mortgage Record 388, page 693. Under the terms of the agreement between the Mennonite Board of Missions and Alfred Jean M. Moore, the mortgagor was responsible for paying the property taxes on the said real estate. Although the Mennonite Board of Missions did pay the property taxes on the said property, in June of 1974 and in November of 1974, Alfred Jean M. Moore, was to pay all subsequent taxes due and owing. The Mennonite Board of Missions had no knowledge whatsoever that the property taxes on the said property had not in fact been paid by Alfred Jean M. Moore until August 16, 1979, since Alfred Jean M. Moore had been regularly making her monthly mortgage payments. At this time, she still owed the Defendant, Mennonite Board of Missions, Eight Thousand Two Hundred Thirty-seven

and 19/100 ($8,237.19) Dollars, with interest thereon at seven (7%) percent.

ISSUE

DOES THE TAX DEED OF THE PLAINTIFF ELIMINATE THE PRIOR RECORDED MORTGAGE OF THE DEFENDANT?

SUMMARY ARGUMENT

The Plaintiff maintains that the tax deed from the County Auditor had eliminated the lien of the Defendant, Mennonite Board of Missions, even though the lien was secured by a prior recorded mortgage. In support of this contention, the Plaintiff relies on Ind. Code 6-1.1-25-4 (d).

This position, however, fails to consider another Indiana Statute which deals with priorities between conflicting interests in real property. That statute, Ind. Code 32-1-2-16, provides that interests in real property which are first recorded have priority over subsequent interests in property, whether the latter are recorded

or unrecorded. Thus, to the extent that Ind. Code 6-1.1-25-4 (d) can be construed to give the Plaintiff a fee simple absolute to the said property, free and clear of the interest of the Defendant, Mennonite Board of Missions, that statute is unconstitutional as applied, and further, violates the fundamental notions of due process as set out in the United States Constitution and/or the Indiana Constitution, Article I, Section 12, since the Mennonite Board of Missions never had any knowledge of the tax sale. Accordingly, any interests of the Plaintiff to the said real estate is inferior to, subject to, or secondary to the interest of the Defendant, Mennonite Board of Missions.

ARGUMENTS

TO EXTINGUISH THE PRIOR RECORDED MORTGAGE OF THE DEFENDANT, MENNONITE BOARD OF MISSIONS, WITHOUT ADEQUATE NOTICE, VIOLATES DUE PROCESS.

The effect of an execution and delivery of a tax deed is spelled out in Ind. Code 6-1.1-25-4 which states in pertinent part that:

> A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances except the liens of the state for taxes and special assessments which accrue subsequent to the sale and which are not removed under sub-section C of this section.

Seemingly, the above-quoted statutory law would indicate that the grantee of a tax deed takes his title free and clear of the lien of the Defendant. However, this position ignores one decisive factor which leads to a contrary result. The statutory structure for selling delinquent property for taxes in the State of Indiana is

unconstitutional as applied to the Mennonite Board of Missions for the reason that they were never given actual or adequate notice of the tax sale.

The statutory procedures for selling property for delinquent property taxes provides for notice to be given for such a sale once a week for three consecutive weeks in a newspaper of general circulation in the county where the sale takes place. In addition, it is provided that the legal owner of property being sold for delinquent taxes be given actual notice of the sale. See Ind. Code 6-1.1-24-3 and 4. Nowhere in the statutes which deal with the procedures for a tax sale is it provided that a lien holder should be given actual notice of a tax sale. Because of this lack of notice to a lien holder of a tax sale, his rights cannot be extinguished by such a sale despite the provision in Ind. Code 6-1.1-25-4 (d).

To enforce that statutory provision, without adequate notice to the lien holder, violates fundamental concepts of due process.

By way of analogy, there is a wealth of authority for the proposition that the Indiana statutes discussed herein violate due process in regard to the elimination of Mennonite Board of Mission's lien. The seminal case is Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950). In that case a New York statute authorized a trustee to give notice by publicaton of impending judicial settlements of common trust fund accounts. Actual notice was not required. The United States Supreme Court held that notice by publication did not fulfill the requirements of fundamental due process in regard to the beneficiaries who held present interest in that fund. The high court held that to fully adjudicate legal rights a defendant must

be given, if at all possible, actual notice of any pending litigation in order that he may appear at any hearing on the matter and defend his rights. If actual notice was not possible, then the party defendants must be given notice "reasonably calculated to reach interested parties." The Court in Mullane, supra, held that notice by publication was insufficient notice and that the defendants at the least should have been served by mail since such a method was more apt to give interested parties actual notice of any pending litigation. The same hold true in this case.

In Walker vs. City of Hutchinson, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956), the appellant's land was taken by condemnation by the City of Hutchinson, Kansas. Notice of this proceeding was given as provided by statute which only required publication in a newspaper of

general circulation. After the time for appealing the condemnation had expired, Walker commenced a proceeding alleging that since he had never been actually notified of the condemnation proceeding, there was insufficient notice to satisfy the Fourteenth Amendment due process clause. The Kansas Supreme Court rejected Walker's request to enjoin the City of Hutchinson from entering or trespassing on his property. The United States Supreme Court reversed, stating inter alia that:

> Measured by the principals stated in the Mullane case, we think that the notice by publication here falls short of the requirements of due process.... In Mullane we pointed out many of the infirmatives of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case, there seems to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the City and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.

Id. 352 U.S. 114, 116; 77 S. Ct. 200, 202

A subsequent U. S. Supreme Court case, Schroeder v. City of New York, [1962] 371 U.S. 208, 83 S. Ct. 279, invalidated a New York statute which is strikingly similar to the Indiana statutes here in question. In that case, the City of New York wanted to acquire the right to divert water from a river that flowed through Schroeder's land. Despite the fact that Schroeder's name and address was (sic) readily ascertainable from public records the City made no attempt to serve her personally of its suit to divert water across her property. Instead, notice of the City's acquisition was published in several newspapers with limited circulation, and notices were posted on trees along the river on Schroeder's property. The U. S. Supreme Court held the New York statutory scheme unconstitutional. To the same effect, this

court should find the Indiana statutes unconstitutional as applied because the Mennonite Board of Missions was not give actual notice of the pending tax sales, or that the redemption period was running, even though they could have been contacted since their mortgage was a matter of record.

APPLICABLE INDIANA CASE LAW

A recent Indiana Court of Appeals case, First Savings and Loan Association of Central Indiana v. Furnish, (1977), Ind. App., 367 N.E. 2d 596 held that due process did not require that a mortgagee be given actual notice of a tax sale. In Furnish, supra, the Plaintiff/Appellant, First Savings and Loan Association, was an assignee of a mortgage of property owned in Grant County, Indiana. The mortgagor defaulted in its principal payments and also became delinquent in its real estate

tax. As a result, the land was sold at a tax sale to Furnish after notice of the impending sale was sent to the mortgagor by certified mail. Notice of the tax sale was also published in the newspaper of local circulation in Grant County for three consecutive weeks pursuant to statute. No actual notice was sent to First Savings and Loan Association, although the loan institution became aware of the sale during the redemption period.

It is important to note at this juncture certain important factual dissimilarities with the case at bar as compared to Furnish. First of all, in Furnish, the mortgagee had actual notice that its mortgage property was delinquent in taxes and had been sold at a tax sale before the statutory period to redeem that property had expired. In the present case at bar, the mortgagee, the Defendant, Mennonite Board of Missions, had no knowledge at all

that its mortgage property was delinquent in taxes, until after the period to redeem that property had expired. In addition, the mortgagor in the Furnish case had become delinquent in the payment of its mortgage. Yet, in the present case, Alfred Jean M. Moore had regularly made her mortgage payments to the Mennonite Board of Missions, albeit she was delinquent in her payment of real estate taxes, a fact which was unknown to the Mennonite Board of Missions until after the Plaintiff had obtained a tax deed.

Aside from these factual dissimilarities with the Furnish case, the reasoning in that case is subject to doubt. Professor Townsend, (Professor of Law, Indiana University School of Law, Indianapolis) lambasted the Furnish case, in a recent law review article.

> The decision thus attempts to resolve the unsettled question of whether the United States Supreme

> Court decision in Mullane v. Hanover Bank and Trust Company applies to tax lien sales. Under that decision, constructive notice by publication is inadequate when actual notice can be given to a party in judicial type proceedings affecting its property. Unfortunately, the Court of Appeals failed to consider the obvious fact that tax sales are generally known to be conducted in careless, haphazard manner which do not produce a fair price for the property. Lack of notice to interested parties more than likely is one of the reasons for low prices at tax sales. Hopefully, this decision will not end the search for due process of law. 12 Ind. L. R. 289, 294 (1979) (emphasis added)

In Furnish the court chose to apply principles of due process only to "owners of the affected property."

What the Court of Appeals does is miscontrue Mullane by narrowing the application of fundamental notions of due process.

The U. S. Supreme Court had already rejected the position that due process covers only "owners of the affected property." In Fuentes v. Shevin (1972) 407

U.S. 87, 92. S. Ct. 1983, the U. S. Supreme Court wherein said in pertinent part:

> The appellants who sign conditional sales contracts lack full legal title to the replevied goods. The Fourteenth Amendment's protection to "property", however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest."
> Id. 92 S. CT. 1983, 1997

The result reached in the Furnish case is further subject to doubt because the same court which decided Furnish, in an earlier decision, chose not to narrow the Mullane case. In Anderson Federal Savings and Loan Association v. Guardianship of Davidson, (1977) Ind. App. , 364 N.E. 2d 781 the Court of Appeals properly held that due process covers "any significant property interest" and not just to "owners of the property". In Anderson Federal Savings and Loan, supra, the Court states

the general law of due process as follows:

> Thus the idea consistently emerges from the case law of this state that a third person whose rights or claimed rights are to be affected by an adjudication, must be accorded an opportunity to be heard before a deprivation may legally occur. Id. 364 N.E. 2d 781, 785 (emphasis added)

Another Indiana decision, Shula v. Shula (1956), 235 Ind. 210, 132 N.E. 2d 612, held as a matter of due process that a mortgagee must be made a party to a divorce (given notice) before a trial court could make an order relieving the wife from liability for a mortgage note she had jointly signed.

Applying the fundamental principles of due process as outlined above, it is readily apparent, that Furnish, supra, misapplied those basic constitutional concepts, and accordingly, this honorable court should reject that ruling, and hold

that due process does require the Mennonite Board of Missions be given actual notice rather than merely constructive notice of a tax sale; or at least actual notice during the redemption period before its recorded lien can be eliminated by law.

In the Furnish case, it cannot be over emphasized that the mortgagee therein had actual notice of a tax sale, and an opportunity to exercise its option to redeem pursuant to Indiana law, prior to a tax deed being given to Furnish. The Mennonite Board of Missions submits that the Plaintiff had a duty to inform it that he had purchased the property at a tax sale, and thereby giving the Mennonite Board of Missions an opportunity to redeem that property prior to the Plaintiff receiving his tax deed. It is interesting to note that no contact was made by the Plaintiff at all in regard to giving the

Mennonite Board of Missions knowledge of the tax sale. But after the Plaintff received his tax deed, he had no problem at all in checking the records, and seeking to eliminate the Defendant's, Mennonite Board of Missions', interest in the said property after it was too late for them to redeem that property.

It is a fundamental notion of due process that where the name and address of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of the pendency of an action which could eliminate those rights. The Plaintiff should have sent by letter to the Mennonite Board of Missions, notice that he had purchased the said property at a tax sale before the redemption period expired. At the very least, the County Auditor as a matter of due process, should have notified the Defendant, Mennonite

Board of Missions, that its property had been sold for taxes, and that the redemption period was running. Failure to give actual notice to the Defendant, Mennonite Board of Missions, that the property in which it had a valid prior recorded mortgage, had been sold for taxes, and that the Mennonite Board of Missions had a right to redeem that property, violates the fundamental notions of due process as set out in Mullane and other cases cited above.

Since no notice was given, and the statute provides for no actual notice, that statute is unconstitutional as applied to the Defendant, Mennonite Board of Missions, and this honorable court should so find, and enter a judgment in favor of the Defendant, Mennonite Board of Missions, to the effect that any and all claims of the Plaintiff be declared to be inferior to, subject to, and secondary to

the interest of the Defendant, Mennonite Board of Missions, relative to the prior recorded interest.

Respectfully submitted,

* * * * *

(s) C. Whitney Slabaugh

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

TENDER OF FUNDS TO COURT BY MENNONITE BOARD OF MISSIONS

Filed Feb. 8, 1980
[Caption Omitted in Printing]

Comes now the Defendant, Mennonite Board of Missions, by counsel and tenders to the Court and Clerk the sum of Two Thousand Sixty-two Dollars and Fifty-four Cents ($2,062.54) which sum reflects the statutory amount (Ind. Code 6-1.1-25-2) required to be paid to the above named Plaintiff by a lienholder to redeem the

property which is the subject matter of the present litigation, and that the Court order the Clerk to hold said funds in trust, bearing interest, until the Court otherwise directs dispersal of said funds and in support thereof, shows the Court the following:

1. That the Plaintiff paid One Thousand One Hundred Sixty-seven Dollars and Seventy-five Cents ($1,167.75) to purchase the said property at a tax sale on August 8, 1977.

2. That on November 10, 1979, the Plaintiff paid Seven Hundred Thirty-four Dollars and Ninety Cents ($734.90) for the property taxes due and owing on the said property from August 8, 1977 to August 10, 1979.

3. That the amount of Two Thousand Sixty-two Dollars and Fifty-four Cents ($2,062.54) reflects the amount required

to redeem the said property under Ind. Code 6-1.1-25-2.

4. That in the event that the Court should grant the Defendant's Motion for Summary Judgment filed on January 31, 1980, in this cause, the amount tendered by the Defendant to the Court and Clerk should be paid to the Plaintiff, and the claim of the Plaintiff to the subject property should be extinguished pursuant to law.

WHEREFORE, the Defendant respectfully asks the Court to order the Clerk to place the funds tendered by the Defendant in an interest bearing trust account and to hold the same in trust until otherwise directed to disperse the same by the Court.

* * * * *

(s) C. Whitney Slabaugh

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

STATE OF INDIANA)
COUNTY OF ELKHART) SS:

IN THE ELKHART SUPERIOR COURT
1980 TERM
CAUSE NO: 50004

RICHARD C. ADAMS,
Plaintiff
v
MENNONITE BOARD OF MISSIONS,
Defendants

ORDER ACCEPTING TENDER OF FUNDS

Filed Feb. 8, 1980

The Court having reviewed the Motion for Tender of Funds of the Mennonite Board of Missions, and being duly advised now accepts the Tender of Funds by the said Defendant, and orders the Clerk to place said funds in an interest bearing trust account, and hold the same until otherwise ordered by the Court.

So ordered this 8th day of February, 1980.

(s) Donald W. Jones
Judge, Elkhart Superior Court

Certificate of Service
[Omitted in Printing]

STATE OF INDIANA)
COUNTY OF ELKHART) SS:

IN THE ELKHART
SUPERIOR COURT
1980 TERM
CAUSE NO: 50004

RICHARD C. ADAMS,
Plaintiff
v
MENNONITE BOARD OF MISSIONS,
Defendants

SUMMARY JUDGMENT

Filed Feb. 26, 1980

Cause coming on for hearing on motion for summary judgment filed by the plaintiff and the defendant.

Court having heard the evidence and arguments of counsel, and both counsel having informed the Court that there is, in fact, no dispute as to any material facts, Court now finds that there is no genuine issue as to any material facts and further finds that the law is with the plaintiff based on the case of First Savings & Loan Association of Central Indiana v. Furnish (1977), 367 N.E. 2d 596, and that the plaintiff is entitled

to summary judgment granting the relief sought in the complaint as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the plaintiff and against the defendant on the motion for summary judgment and that the title to the real estate described in the complaint be quieted in the title in the plaintiff and that the plaintiff shall own said real estate free and clear of any claim by the defendant.

Tax costs to the defendant. JUDGMENT.

(s) Donald W. Jones
Donald W. Jones, Judge
ELKHART SUPERIOR COURT

Dated this 26th day of February, 1980.

[IN THE ELKHART SUPERIOR COURT]

DEFENDANT'S MOTION TO CORRECT ERRORS

Filed Apr. 21, 1980
[Caption Omitted in Printing]

Comes now the Defendant, Mennonite Board of Missions, by counsel, and respectfully moves the Court to correct its judgment entered on February 26, 1980, wherein the Court found "... that the law is with the Plaintiff based on the case of First Savings and Loan Association of Central Indiana v. Furnish (1977), 367 N.E. 2d 596, and the Court thereafter ordered, adjudged and decreed that "... the title to the real estate described in the complaint ... be quieted ... in the Plaintiff, and that the Plaintiff shall own said real estate free and clear of any claim by the Defendant", because the said judgment of the Court is contrary to law for the following reasons:

1. It violates due process and equal protection under the United States and Indiana constitutions.

2. The law is not with the Plaintiff based on the Furnish case.

3. That due process of law and of equal protection under the law requires that the Defendant, Mennonite Board of Missions, be given notice, reasonably calculated, under the circumstances, to apprise it that its property interest was being sold at a tax sale, and the Defendant, Mennonite Board of Missions, was not in fact given reasonable notice that its property was sold at a tax sale until after the period to redeem its property interest had expired.

4. That to the extent that Ind. Code 6-1.1-25-4 can be construed to give the Plaintiff a fee simple absolute to the property which is the subject matter of this litigation, free and clear of the

property interest of the Defendant, Mennonite Board of Missions, that statute is unconstitutional and violates the fundamental notions of due process and equal protection as set out in the United States Constitution and the Indiana Constitution.

5. That the applicable provisions of Indiana law relative to the sale of real property for delinquent taxes violate fundamental notions of due process and equal protection as set out in the United States Constitution and/or the Indiana Constitution, because they fail to provide adequate notice to record lienholders when their property interests are being sold at a tax sale.

6. That it is an unreasonable classification, which violates equal protection, that Indiana laws relative to the sale of real property at tax sales provide for notice to the owners of real property, and

not to record lienholders, and that there is no rational basis for this distinction.

7. That the Court of Appeals in Furnish, supra, misapplied the constitutional guidelines of due process and equal protection in their review of Indiana laws relative to tax sales of real property:

> (a) Since "state action" and a "property interest" is involved in tax sales, a higher degree of judicial scrutiny is required in reviewing the applicable Indiana Statutes to see if they pass constitutional muster, than was applied by the Furnish court.
>
> (b) That the Furnish court erroneously narrowed the concept of due process in regard to tax sales under Indiana law by holding that due process did not require personal notice to record lienholders.
>
> (c) That the Furnish court misreads the meaning of the term "owners" as it is found in Ind. Code 6-1.1-24-4 and other provisions in Indiana law relative to tax sales of real property.

8. That the facts of this case take it out of the reach and holding of the Furnish case, because in the case at bar,

(a) The lienholder, Mennonite Board of Missions, had no knowledge whatsoever that its property interest was sold for taxes until after the period to redeem it had expired, whereas:

(b) The lienholder in the Furnish case obtained knowledge that its property interest had been sold at a tax sale prior to the expiration of the redemption period, but deliberately chose not to redeem it.

WHEREFORE, the Defendant, Mennonite Board of Missions, prays that the Court correct its judgment entered on February 26, 1980, and thereafter enter a judgment holding that the property interest of the Plaintiff is subject, inferior, and secondary to the property interest of the Defendant, Mennonite Board of Missions, and for all other relief proper in the premises.

* * * * *

(s) C. Whitney Slabaugh

(s) William J. Cohen

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CERTIFICATE OF SERVICE
[Omitted in Printing]

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO CORRECT ERRORS

Filed Apr. 21, 1980
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

REQUEST TO WITHDRAW TENDER OF FUNDS

Filed Apr. 21, 1980
[Caption Omitted in Printing]

Comes now the Defendant, Mennonite Board of Missions, by counsel, and respectfully moves the Court to allow it to withdraw its tender of funds to the Court made on February 8, 1980, and in support thereof show the following:

1. That since this action is a proceeding in equity, to quiet title, and resolve the priority of the respective

property interests of the parties, the Defendant felt that to invoke equity, it must do equity, and accordingly, made its good faith tender offer to redeem its property interest pursuant to Ind. Code 6-1.1-25-2 as reasonably as possible to do so after obtaining knowledge of the Plaintiff's property interest.

2. That although the Defendant, Mennonite Board of Missions, maintains as a matter of law that the Plaintiff's property interest should be extinguished under the law in exchange for the Defendant, Mennonite Board of Missions', tender offer to redeem the said property, this would result in the Defendant, Mennonite Board of Missions, making a profit, and because the Defendant, Mennonite Board of Missions, is a non-profit, charitable, eleemosynary corporation, the Defendant, Mennonite Board of Missions renounces that remedy at this time.

WHEREFORE, the Defendant, Mennonite Board of Missions, prays that the Court grant this request to withdraw the tender offer heretofore made by it and return the tendered funds to the Mennonite Board of Missions, together with interest at the legal rate, and for all other relief proper in the premises.

* * * * *

(s) C. Whitney Slabaugh

(s) William J. Cohen

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

STATE OF INDIANA)
COUNTY OF ELKHART) SS:

IN THE ELKHART
SUPERIOR COURT
1980 TERM
CAUSE NO: 50004

RICHARD C. ADAMS,
Plaintiff
v
MENNONITE BOARD OF MISSIONS,
Defendants

ORDER

Filed Apr. 21, 1980

The Court having reviewed the Motion for Request to Withdraw Tender of Funds of the Mennonite Board of Missions, which reads as follows: (H.I.), and being duly advised, now orders the Clerk to return the said funds together with interest at the legal rate.

So ordered this 21st day of April, 1980.

(s) Donald W. Jones
Judge, Elkhart Superior Court

CERTIFICATE OF SERVICE
[Omitted in Printing]

[IN THE ELKHART SUPERIOR COURT]

PRAECIPE

Filed May 1, 1980
[Caption Omitted in Printing]

TO THE CLERK OF THE ELKHART SUPERIOR COURT OF ELKHART COUNTY:

You are hereby requested to prepare and certify a complete transcript of the entire record of the above-entitled cause to be used on appeal to the Court of Appeals in Indiana.

The record, as above requested, should include the entire record in the above-entitled cause from the date the original complaint was filed, up to and including final judgment and the ruling on the Motion to Correct Errors. It shall include without limitation certified copies of all process, pleadings, motions and other written documents filed or offered to be filed during the proceedings. A

certified copy of the Motion to Correct Errors should be included at the beginning of the transcript.

Respectfully submitted,

* * * * *

(s) C. Whitney Slabaugh
(s) William J. Cohen

* * * * *

CERTIFICATE OF SERVICE
[Omitted in Printing]

MORTGAGE

Vol. 388 Page 693
(Added by Elkhart County Recorder)

REAL ESTATE MORTGAGE

* * * * *

This Indenture Witnesseth, that ALFRED JEAN M. MOORE, a married adult lady as her sole property, 1829 Stevens Avenue, Elkhart, Indiana of Elkhart County, in the State of Indiana Mortgage and Warrant to MENNONITE BOARD OF MISSIONS a corporation, of Wayne County, in the State of Ohio, the following described Real Estate in Elkhart County, in the State of Indiana, as follows, to-wit:

> Lot Numbered Two Hundred Forty (240) as the said lot is known and designated on the recorded plat of Morehous Second Addition to the City of Elkhart.
>
> Subject to 1973 taxes due in 1974.
>
> To secure the payment of Fourteen Thousand ($14,000.00) Dollars, evidenced by one (1) promissory note executed by mortgagor to mortgagee,

> payable in installments of One Hundred Fifty ($150.00) Dollars per month, including interest on the 7th day of each and every month beginning March 7, 1973 and all balance on or before twelve (12) years after date, said note bearing date of February 7, 1973, bearing interest at the rate of seven per cent (7%) per annum after date until paid, interest payable monthly, and all collection and attorney's fees,

and the mortgagor expressly agrees to pay the sum of money above secured, without relief from valuation or appraisment laws; and upon failure to pay any one of said notes, or any part thereof, at maturity, or the interest thereon, or any part thereof, when due, or the taxes or insurance as hereinafter stipulate, then all of said notes are to be due and collective, and this mortgage may be foreclosed accordingly. And it is further expressly agreed, that until all of said notes are paid, said mortgagor will keep all legal taxes and charges against said premises

paid as they become due, and will keep the buildings thereon insured for the benefit of the mortgagee, as its interest may appear and the policy duly assigned to the mortgagee, to the amount of Fourteen Thousand and no/100 Dollars, and failing to do so, said mortgagee, may pay said taxes or insurance, and the amount so paid, with 7 per cent interest thereon, shall be a part of the debt secured by this mortgage.

In Witness Whereof, the said mortgagor has hereunto set her hands and seal this 7th day of February, 1973

(Seal) (s) Alfred Jean M. Moore
Alfred Jean M. Moore

STATE OF INDIANA, Elkhart COUNTY, ss:

Before me, the undersigned, a Notary Public in and for said County, this 27th. day of February 1973, came Alfred Jean M. Moore, and acknowledged the execution of the foregoing instrument. Witness my hand and official seal.

My Commission expires October 1, 1975.

(s) Clifford P. Martin Notary Public
Clifford P. Martin

This instrument prepared by: Mennonite Board of Missions by Edna Carpenter

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